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In the Supreme Court of the United States

OCTOBER TERM, 1979

EGIDIO CERILLI, MAYLAN YACKOVICH, JOHN SHURINA AND RALPH BUFFONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

DEBORAH WATSON
Attorney
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A41) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979. A petition for rehearing was denied on July 23, 1979. The petition for a writ of certiorari was filed on August 15, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' use of public office to procure political contributions constituted extortion under color of official right in violation of the Hobbs Act.

2. Whether the evidence was sufficient to establish a nexus with interstate commerce under the Hobbs Act.

STATUTE INVOLVED

18 U.S.C. 1951 provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of violating, and conspiring to violate, the Hobbs Act, 18 U.S.C. 1951, by unlawfully affecting commerce by means of extortion, consisting of obtaining the property of others, with their consent, induced by wrongful use of fear and induced under color of official right.[1] Petitioner Cerilli was sentenced to three years' imprisonment on each of four substantive counts, to run concurrently with a three-year sentence on the conspiracy count, and a fine of $2,000. Petitioner Yackovich was sentenced to two years' imprisonment on each of four substantive counts, the terms to run concurrently with a two-year sentence on the conspiracy count, and to a fine of $2,000. Imposition of sentence on petitioners Shurina and Buffone was suspended; Shurina was placed on three years' probation, and Buffone was placed on five years' probation. The court of appeals affirmed, with one judge dissenting (Pet. App. A1-A41).

[1]Petitioners Cerilli, Yackovich and Shurina were tried together (Pet. App. A3 n.1). Petitioner Buffone obtained a severance when he became ill during trial (*ibid.*). He subsequently waived his right to a jury trial and entered into a stipulation with the government whereby the testimony at the trial of the other petitioners was made part of his record. Buffone was found guilty by the district court (*ibid.*).

The evidence, as summarized by the court of appeals, showed that petitioners were employees of the Pennsylvania Department of Transportation (PennDOT) in Westmoreland County,[2] which leased equipment from private owners in order to fulfill its snow removal and general road maintenance and repair responsibilities (Tr. 128-131, 467-477, 696). Petitioners determined which private owners would obtain such leases and the amount of work for which a lessor's equipment would be used under the lease (Tr. 696-708). Petitioners further determined the rates to be paid the lessors for the equipment, up to a maximum rate set by the Department of Highways (Tr. 707). Petitioners required numerous lessors to make payments (which petitioners claim were political contributions) as a condition to receiving work under their leases (Tr. 166-168, 229-230, 272-274, 280-284, 442-445, 460, 514-523, 525, 575-576, 578, 604-606, 657-660, 911-916, 922-925, 977-978, 983-985, 1007-1009, 1044-1046, 1051, 1092-1093).

[2]Petitioner Cerilli was Superintendent, and petitioners Buffone, Yackovich and Shurina were Assistant Superintendents, of PennDOT (Tr. 128-131, 467-477).

ARGUMENT

1. Petitioners contend (Pet. 8-12) that government employees who demand payments of partisan political contributions as the price for awarding work under government leases do not thereby violate the Hobbs Act because (1) government employees' solicitations of political contributions from those who wish to benefit from government contracts controlled by those employees do not constitute extortion "under color of official right," absent proof of actual or threatened force, violence, or fear, and because (2) according to petitioners' reading of this Court's decision in *United States* v. *Enmons*, 410 U.S. 396 (1973), a Hobbs Act violation may never be found when the end sought by the defendant, *e.g.*, raising funds for a political party, is not in itself wrongful. As we show below, the first contention need not be reached on the facts of this case. In any event, the decision of the court of appeals rejecting both contentions is correct and does not conflict with decisions of this Court or any court of appeals.

a. Petitioners (Pet. 10) and Judge Aldisert, in his dissent (Pet. App. A40-A41), attempt to raise the spectre of the use of the Hobbs Act to prosecute public officials guilty of nothing more than soliciting political contributions from those who stand to profit from state expenditures over which the officials could exert some influence. This, they contend, is the inevitable result of construing the Act to permit convictions of public employees for extortion, absent proof that the employees made use of "actual or threatened force, violence, or fear," and they urge that such a construction of the Act is improper. We argue below that this construction of the Act is correct; but there is no need for this Court to consider the question because it is not presented on the facts of this case.

As the court of appeals observed (Pet. App. A17), "the proof of coercion in this case is overwhelming." Numerous witnesses testified (Tr. 178, 280-284, 460, 578, 657-658, 663, 925-926, 945-946, 978-985, 1092-1093) that, as a result of petitioners' conduct, they feared that they would receive no work under their leases with PennDOT unless they made the requested payments. Such fear of economic loss constitutes "fear" within the meaning of the Hobbs Act's definition of extortion, so long as the fear is reasonable. See, *e.g.*, *United States* v. *Brown*, 540 F. 2d 364, 373 n.6 (8th Cir. 1976); *United States* v. *DeMet*, 486 F. 2d 816, 819 (7th Cir. 1973), cert. denied, 416 U.S. 969 (1974). Here the fears were clearly reasonable, since the testimony showed that in several instances lessors' equipment actually was laid off as a result of their refusal to make the requested payments (Tr. 983-985, 1043-1045, 1091-1093).

Petitioners contend, however (Pet. 13-14), that the lessors' testimony established that the payments were merely continuations of a longtime practice of making political contributions to the party in power as a matter of business expediency and that the payments were therefore not extorted. But petitioners were given great latitude at trial to inquire into the nature of the lessors' prior contacts with PennDOT officials and their prior contributions. The jury obviously rejected petitioners' "business expediency" defense, based on other testimony (Tr. 229-230, 283, 318-319, 389, 409-410, 413-415), which showed that the contributions made in the past were significantly different from the instant payments. As one lessor testified (Tr. 412), "I'd say the difference is between having the arm twisted and having it taken off."

Petitioners also contend that the court of appeals' summary rejection (Pet. App. A4 n.2) of their claim that the evidence failed to establish that the lessors were motivated by fear of economic loss in agreeing to petitioners' demands for contributions conflicts with *United States* v. *Callahan*, 551 F. 2d 733 (6th Cir. 1977). But *Callahan* held only that an engineering contractor's payments to a labor union motivated by a desire to use employees other than members of that union would not, without more, violate the Hobbs Act. This type of "business expediency"—making payments "to avoid having to hire through a different local union, with different rules and hiring practices, at each construction site" (551 F. 2d at 736)—is entirely different from expediency based on concerns that contracts will not be awarded if payments are not made; the former involves considerations of convenience, the latter obvious fears of economic loss.

In any event, the contention that the Hobbs Act does not prohibit takings of property "under color of official right," absent proof of actual or threatened force, violence, or fear, has been rejected by every circuit to consider the question. See *United States* v. *Brown*, *supra*, 540 F. 2d at 371-372; *United States* v. *Hall*, 536 F. 2d 313, 320-321 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States* v. *Hathaway*, 534 F. 2d 386, 393 (1st Cir.), cert. denied, 429 U.S. 919 (1976); *United States* v. *Trotta*, 525 F. 2d 1096, 1099-1100 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976); *United States* v. *Price*, 507 F. 2d 1349, 1350 (4th Cir. 1974); *United States* v. *Staszcuk*, 502 F. 2d 875, 877-878 (7th Cir. 1974), aff'd in part and rev'd in part on other grounds, 517 F. 2d 53 (en banc), cert. denied, 423 U.S. 837 (1975); *United States* v. *Kenny*, 462 F. 2d 1205, 1229 (3d Cir. 1972). As the court below noted (Pet.

App. A7, A18), neither the plain language of the statute nor its legislative history supports petitioners' proposed reading.[3]

b. Petitioners also argue (Pet. 11-12) that their conduct did not violate the Hobbs Act because they had as their aim not a "wrongful end," such as obtaining personal payoffs, but a legitimate, even constitutionally protected, goal—raising funds for a political party.[4] In support of this contention they rely on *United States* v. *Enmons*, 410 U.S. 396 (1973), in which this Court held that labor union

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[3] *United States* v. *Nardello*, 393 U.S. 286 (1969), established that the Hobbs Act uses the term "extortion" in a generic sense rather than as a reference to state law. Judge Aldisert in his dissent argued (Pet. App. A31-A37) that because the statutory language of the Hobbs Act derives in large part from New York's extortion statute, which distinguishes extortion (requiring either an element of coercion or a misrepresentation that the payments demanded are an authorized fee) from bribery, the New York definition of extortion should be incorporated into the Hobbs Act. The court below disagreed, stating (Pet. App. A18):

> Before a court decides that such broad language ["under color of official right"] was intended to have so constricted a meaning, more explicit direction must be available either in the form of actual statutory language or persuasive legislative history. We have neither here. * * * [W]e believe that it is still proper for a court to construe an unambiguous statute according to the clear meaning of its terms particularly where every other appellate court has so construed it and where, despite the dissent's assertions, the legislative history is silent as to any contrary congressional intent. If language is to be "struck from the Act," this is work for the Congress, not for the courts.

[4] The government does not concede, nor does the record show, that the money demanded by petitioners was in fact used for legitimate political purposes. Some of the payments were made in cash, and petitioners presented no evidence as to the disposition of this money. However, because testimony at trial established that some of the payments were in the form of checks made out to political committees, we will assume, as did the court of appeals (Pet. App. A4), that these payments constituted political contributions.

members' use of wrongful means—strike violence—to achieve a legitimate objective—higher wages as compensation for their work—does not violate the Hobbs Act.

As the court of appeals correctly noted, however (Pet. App. A7), *Enmons* does not aid petitioners because it concerns only conduct arising in the context of labor relations. The Court in *Enmons* relied heavily on legislative history of the Hobbs Act revealing a congressional intent to avoid policing the conduct of strikes (410 U.S. at 401-408, 411). There is no similar legislative history suggesting that Congress sought to limit the broad sweep of the phrase "under color of official right." Moreover, the Court's construction in *Enmons* of the term "wrongful" appearing in the Hobbs Act's definition of extortion (18 U.S.C. 1951(b)(2)) is not logically applicable in cases that, unlike *Enmons*, involve payments demanded "under color of official right." In *Enmons* the Court construed the term "wrongful" as limiting the Act's coverage of takings of property induced by force, violence, or fear to those takings that were otherwise wrongful, *i.e.*, taking of property to which the actor has no legitimate claim. 410 U.S. at 399-400. This was necessary, the Court reasoned, because the term "wrongful" as a modifier of "each of the enumerated means of obtaining property—actual or threatened force, violence, or fear" would otherwise be superfluous, since taking property by force or violence is inherently wrongful. *Id.* at 399. Because the term "wrongful" plainly does not, under conventional rules of English grammar, modify "under color of official right," a similar argument is not appropriate with respect to the latter phrase.

Finally, as the court of appeals observed (Pet. App. A7), reading *Enmons* as broadly as petitioners urge "could effectively repeal the Hobbs Act," for "[t]he receipt of money, whether by a political party, a charitable institution or by an individual is generally not inherently wrongful. The wrong under the Hobbs Act is the manner in which it is obtained."[5] The court of appeals' refusal to overturn petitioners' convictions simply because the case concerns political contributions, rather than payoffs shown to have been converted to petitioners' personal use, is supported by the relevant case law and presents no issue in need of resolution by this Court. See, *e.g.*, *United States* v. *Trotta*, *supra*, (the use of the power of public office to procure the payments of money, including political contributions, not owed to the public official or his office constitutes an offense under the Hobbs Act); *United States* v. *Emalfarb*, 484 F. 2d 787 (7th Cir.), cert. denied, 414 U.S. 1064 (1973) (violation of the Hobbs Act found when defendant, following trucking company's refusal to make political contribution, extorted such contributions by suggesting he had the power to cause state police to stop and ticket the company's trucks). See also *United States* v. *Green*, 350 U.S. 415, 420 (1956) (coercive demands by union officials for payments to be made to others violated Hobbs Act because "extortion as defined in the statute in no way depends upon having a direct benefit conferred on the person who obtains the property").

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[5]Under petitioners' theory that there must be a "wrongful end" apart from wrongful means in order to make out a Hobbs Act violation, honest disputes between interstate businesses over the terms of a contract could be resolved by the extortionate use of force or threats, since the end sought could be considered lawful. It is well settled, however, that such conduct violates the Hobbs Act. See, *e.g.*, *United States* v. *DiGregorio*, No. 78-1468, (2d Cir. August 14, 1979,

2. Petitioners argue (Pet. 14-16) that because the victims' businesses neither made sales of out-of-state products nor performed services for out-of-state customers, but rather only purchased supplies for their own consumption from out of state, the requisite nexus with interstate commerce was not met. This contention is at odds with settled law.

As the Supreme Court has noted on several occasions, the Hobbs Act does not lend itself to restrictive interpretation. It "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce" by the proscribed means (*Stirone* v. *United States*, 361 U.S. 212, 215 (1960)); and it "sweeps within [its statutory language] all persons who have 'in any way or degree * * * affect[ed] commerce * * * by robbery or extortion.'" (*United States* v. *Culbert*, 435 U.S. 371, 373 (1978)). Thus the courts have consistently held that the alleged extortion need have only a minimal effect on interstate commerce. See, *e.g.*, *United States* v. *Daley*, 564 F. 2d 645, 649 (2d Cir. 1977), cert. denied, 435 U.S. 933 (1978); *United States* v. *Spagnolo*, 546 F. 2d 1117, 1118-1119 (4th Cir. 1976); *United States* v. *Hathaway*, *supra*, 534 F. 2d at 396; *United States* v. *Irali*, 503 F. 2d 1295, 1298 (7th Cir. 1974). Accordingly, the commerce requirement is met if the extortion depletes the resources of a company that regularly purchases supplies from out of state. *United States* v. *Merolla*, 523 F. 2d 51, 54 (2d Cir. 1975); *United States* v. *Gill*, 490 F. 2d 233, 236-237 (7th Cir. 1973); *United States* v. *DeMet*, *supra*, 486 F. 2d at 821-822; *United States* v. *Augello*, 451 F. 2d 1167, 1169-1170 (2d

Cir. 1971), cert. denied, 405 U.S. 1070 (1972); *Hulahan* v. *United States*, 214 F. 2d 441, 445 (8th Cir.), cert. denied, 348 U.S. 856 (1954).[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

DEBORAH WATSON
Attorney

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[6]Petitioners also complain (Pet. 16) that the trial judge improperly removed from the jury the decision whether the interstate commerce requirement had been met by instructing the jury (Tr. 1259):

> [Y]ou may find interstate commerce within the meaning of these instructions if you find beyond a reasonable doubt that the victim purchased goods in interstate commerce and that the money was extorted from him; then, as a matter of law, commerce was affected.

These instructions were proper. It is well settled that in a Hobbs Act prosecution it is for the court, and not the jury, to determine whether the government's evidence, if believed, would bring the defendant's conduct within the statute and sustain federal jurisdiction. The jury's duty is merely to determine whether the alleged facts have been proven. See *United States* v. *Kuta*, 518 F. 2d 947, 951-952 (7th Cir. 1975); *United States* v. *Hyde*, 448 F. 2d 815, 839-841 (5th Cir. 1971), cert. denied, 404 U.S. 1058 (1972); *United States* v. *Lowe*, 234 F. 2d 919, 922-923 (3d Cir. 1956); *Hulahan* v. *United States*, *supra*, 214 F. 2d at 446.

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